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No. 82-1952

In the Supreme Court of the United States

OCTOBER TERM, 1983

LEO E. BALK, PETITIONER

v.

UNITED STATES INTERNATIONAL COMMUNICATION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Petitioner, a translator in the U.S.S.R. Division of the Voice of America (Pet. App. 1, 6), brought this action under the Privacy Act, 5 U.S.C. 552a, seeking damages and equitable relief based upon a reference to him in an intra-office memorandum written by a fellow employee. Both courts below rejected petitioner's claim on the ground that the challenged memorandum was not contained in a "system of records" within the meaning of the relevant provision of the Act, 5 U.S.C. 552a(a)(5).

1. In 1979, Zora Safir, a Voice of America employee, circulated a memorandum critical of her supervisors (Pet. App. 1). When several other employees urged that Safir be fired, the department chief, Sherwood H. Demitz, required that all such recommendations be made in writing (*id.* at 1-2).

One such complaint was written by Alexander Firsow (Pet. App. 2). Although Firsow's memorandum focused on Safir's conduct, the last portion of it made a casual disparaging reference to petitioner (*id.* at 2, 7). Petitioner requested that the Firsow memorandum be destroyed (*id.* at 2). The International Communication Agency initially refused to do so but gave petitioner a copy of the memorandum, with only the name of another employee deleted (*ibid.*). Later, the Agency deleted the reference to petitioner in the original of the memorandum (Pet. 4; Appellee's C.A. App. 25, 26).[1]

Petitioner then brought this action under the Privacy Act, seeking damages and equitable relief and claiming that the Agency had wrongfully refused to amend the memorandum, had released the memorandum to another individual without his consent, and had not complied with record keeping requirements of the Act.. The government submitted an affidavit of Demitz stating that no copies of the Firsow memorandum had been entered into the Agency's file system or placed in any file relating to petitioner, although a copy of the memorandum, apparently with the reference to petitioner intact, was kept in Demitz's office safe (Pet. App. 10-11).

On the basis of this uncontested showing, the district court held that the Firsow memorandum was not part of a "system of records" within the meaning of the Privacy Act (Pet. App. 6-16). Accordingly, it granted the government's motion for summary judgment. The court of appeals affirmed on that same ground in an unpublished memorandum (*id.* at 1-5).

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[1] "Appellee's C.A. App." refers to the Appellee's Appendix filed in the court of appeals.

2.a. The courts below correctly held that the provision of the Privacy Act concerning disclosure of records, 5 U.S.C. 552a(b), does not apply to the Firsow memorandum. That holding does not conflict with any decision of this Court or any other court of appeals, and further review is accordingly unwarranted. 5 U.S.C. 552a(b) provides (emphasis added) that "[n]o agency shall disclose *any record which is contained in a system of records* by any means of communication to any person or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains unless disclosure of the record" comes within a specified exception. A "system of records" is defined in 5 U.S.C. 552a(a)(5) as "a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol or other identifying particular assigned to the individual."

In the present case, Demitz's uncontested affidavit shows that the Firsow memorandum never became part of any formal agency file and that no copy of it was placed in any file relating to petitioner (Pet. App. 10-11). It is immaterial that Demitz retained a copy in his office safe or that the Agency could retrieve the document in response to petitioner's request because Agency officials remembered where it was placed. The Privacy Act provides protection against disclosure only if the document is maintained in a group of records from which it may be retrieved based upon the name or identifying symbol of the individual. See *Boyd* v. *Secretary of the Navy*, No. 82-6006 (11th Cir. July 11, 1983), slip op. 3913; *Olberding* v. *Department of Defense*, No. 82-2192 (8th Cir. June 17, 1983); *Savarese* v. *HEW*, 479 F. Supp. 304, 307 (N.D. Ga. 1979), aff'd, 620 F.2d 298 (5th Cir. 1980), cert. denied, 449 U.S. 1078 (1981); *Smiertka* v. *Department of Treasury*, 447 F. Supp. 221, 228-229 (D.D.C. 1978), remanded on other grounds, 604 F.2d 698 (D.C. Cir. 1979).

Petitioner points out (Pet. 7) that the Agency has a system of records for all its Privacy Act and Freedom of Information Act files, but there is no indication that the Firsow memorandum became part of whatever Privacy Act file the Agency created in response to petitioner's request. Indeed, Demitz's affidavit indicates that the Firsow memorandum was not in any such file.

b. Petitioner's claim that the Agency wrongfully refused to amend his record plainly does not warrant further review because the Agency has now deleted the reference to petitioner in the original of the Firsow memorandum.

c. Petitioner claims (Pet. 6, 8-9) that the Agency violated various provisions of 5 U.S.C. 552a(e), which imposes certain requirements upon agencies with respect to the collection, use, and maintenance of personal information. However, petitioner has failed to support his general claims with specific allegations or to explain how he was harmed by the alleged violations. For example, he has not specified how the reference to him in the Firsow memorandum was inaccurate, even though the OMB Privacy Act guidelines place the burden of challenging the accuracy of a record upon the individual.[2] 40 Fed. Reg. 28948, 28969 (1975).

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[2]Thus it is irrelevant whether, as petitioner maintains (Pet. 8), 5 U.S.C. 552a(e) applies to records not contained in a system of records. See *Albright* v. *United States*, 631 F.2d 915, 917-920 (D.C. Cir. 1980) (5 U.S.C. 552a(e)(7)), prohibiting the maintenance of records on the exercise of First Amendment rights, applies to records not in system of records). See also *Clarkson* v. *IRS*, 678 F.2d 1368, 1373-1378 (11th Cir. 1982) (*Albright* limited to 5 U.S.C. 552a(e)(7)).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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